**CH'NG CHONG SHONG**

**v.**

**LOK CHEN CHONG & YONG AH JUN**

HIGH COURT MALAYA, PENANG
MOHAMED DZAIDDIN J
[CIVIL SUIT NO. 144 OF 1979]
2 NOVEMBER 1990

***TORT:*** *Negligence - Prosecution witness's evidence rejected as did not see how accident occurred - Use of "mute evidence" - Accident reports, sketch plan and key, police reports - Barred from claiming contributory negligence as did not plead it in statement of claim - Scratch mark - Position of vehicles.*

The plaintiff C was a pillion rider on a motorcycle ridden by the third party Y: a collision occurred between the motorcycle and a motorcar driven by the defendant, L. As a result of Y's death, L withdrew the third party notice. C gave evidence that a car travelling from the opposite direction collided into the motorcycle; however he did know how the collision occurred or on which side of the road the accident occurred. C's witness PW2, although he heard a loud sound, did not see how the accident occurred. His evidence was rejected as being unreliable. As a result, the Court relied on the "mute" evidence, that is, the police report made by Y, report of another motorcyclist, photographs of the vehicles, the sketch plan and keys. L also lodged a police report which confirmed his evidence in chief.

The issues were of liability, contributory negligence and whether L could be liable since C never pleaded this in the Statement of Claim.

**Held:**

**[1]** The mere fact that the evidence of an alleged eye-witness has proved worthless is far from conclusive as against the plaintiff; the mute testimony of the sketch plan and photographs, together with the observations of the investigating officer and admissions by the defence could also be relied on.

**[2]** The crucial part of Y's report (which was made less than an hour after the accident) was the fact that Y was travelling together with C when he overtook a motorcycle and collided with the motorcycle and car approaching from the opposite direction.

**[3]** The photographs of the vehicle did not assist the Court except that there was a big dent on the rear off side door of the car.

**[4]** The sketch plan and keys showed the presence of glass splinters on the left hand side of the road and a long scratch mark measuring 43 feet; the sketch plan also confirmed the contents of the two police reports as to the presence of the other vehicles.

**[5]** The neutral evidence in the form of the police sketch plan, the photographs and the admitted documents *i.e*. the police reports, have not supported C's allegations, rather it corroborates the defendant's version.

**[6]** The presence of glass splinters on the defendant's side of the road as shown in the sketch plan indicated the probability that the collision took place on the defendant's side of the road and it was the said motorcycle which encroached to his side thereby colliding into the said motorcar.

**[7]** From the scratch mark in the sketch plan and the police report, it would appear that C was travelling too fast in the circumstances; thereby encroaching into the wrong side of the road in the face of an approaching motorcar resulting in the collision.

**[8]** The plaintiff had not only failed to plead contributory negligence, but did not even bring up the issue during the trial. In fact, there was no suggestion made to the defendant, under cross-examination, that he was in any way guilty of contributory negligence.

**[9]** The defendant is not any way guilty of contributory negligence because the Court accepted his evidence that he swerved to his right to avoid the collision; he had taken an evasive action to avoid the collision and had therefore exercised due care and proper control of his motorcar.

*[Plaintiff's claim dismissed.]*

**Cases referred to:**
*Yew You & Anor. v. Mah Poay Koh & Anor. [1970] 1 MLJ 57*
*Anuar bin Mat Amin v. Abdullah bin Mohd. Zain [1989] 3 MLJ 313*
*Fookes v. Slaytor [1979] 1 All ER 137*

**Legislation referred to:**
Rules of the High Court 1980, O. 18 r. 12

*For the plaintiff - Darshan Singh Khaira; M/s. Darshan Singh & Co.*
*For the defendant - K. Kumaraendran; M/s. Kumar, Sitham & Co.*

[**Editor's Note:** Plaintiff is appealing above decision]

**JUDGMENT**

**Mohamed Dzaiddin J:**

This is a simple claim of negligence arising out of a collision between motorcycle registration No. PR 6062 ("the said motorcycle") ridden by the third party and the defendant's motorcar PM 6361 ("the said motorcar"). As a result of the collision, the plaintiff suffered injuries, loss and damage.

The plaintiff by his statement of claim stated that at about 8.20 p.m. on 13 August 1987 he was a pillion on the said motorcycle travelling along Jalan Paya Terubong from the direction of Air Itam towards Paya Terubong town when the defendant's motorcar coming from the opposite direction negligently turned into the wrong side of the road and encroached into the said motorcycle's right of way thereby colliding into the said motorcycle. The plaintiff alleged that the said collision was caused solely by the negligence of the defendant. Under the "particulars of negligence" the plaintiff, *inter alia*, alleged that the defendant failed to stop before turning right; turning right without first allowing the said motorcycle to proceed; failed to ascertain whether the road was safe before encroaching into the plaintiff's right of way; and that the defendant drove the said motorcar too fast in the circumstances.

In the defence, the defendant denied that he was negligent and contended that the collision was caused solely and/or contributed to by the negligence of the third party. Under the "particulars of negligence" the defendant alleged that the third party was travelling at an excessive speed and in a rash and reckless manner; that he was overtaking a vehicle in front thereby encroaching into the path of the defendant without giving the latter any reasonable opportunity of avoiding the said collision; and encroaching on to the lawful path of the defendant. Be it noted here that the third party notice which was granted by this Court in

July 1980 against the third party was withdrawn and abandoned by the defendant due to his death before the trial of this action. Hence, the defendant's defence depended on his claim that he was not wholly to blame for the said accident. In his evidence, the plaintiff testified that at the material time he was a pillion on the said motorcycle. He noticed a motorcar travelling very fast from the opposite direction which then collided into the said motorcycle. He, however, stated that he did not pay any attention on how the collision occurred and was not aware which side of the road the accident occurred. Anyhow, as a result of the collision he fell off and was unconscious. He further stated that there was a trench being dug on the right side of the road facing Paya Terubong. Under cross-examination, the plaintiff testified that the road was dark and traffic was not heavy. He was not aware of any vehicle travelling in front of him before the collision. He also denied that his motorcycle was racing with two other motorcycles before the accident. On re-examination, he stated that the trench had been filled-up at the time of the accident.

The plaintiff's witness, Goh Ai Kin (PW2) testified that he was standing at a bus stand near the place of accident. He heard a loud sound but did not see how the accident occurred. He saw a motorcycle lying on the road but did not pay attention which side of the road it was. He also stated that he did not see the motorcycle overtaking any vehicle. Under cross-examination, he stated that he cannot remember the position of the motorcycle from the motorcar as he did not pay any attention. At this stage I should perhaps expect PW2's evidence as being unreliable because he did not see how the accident happened.

It is trite that the mere fact that the evidence of an alleged eye-witness has proved worthless is far from conclusive as against the plaintiff.

> Evidence in support of the plaintiff's case is not necessarily confined to what is adduced on their behalf but the whole of the evidence, from whatever source, must also be taken into consideration ... In the nature of things the plaintiffs were compelled to rely mainly on the mute testimony of the sketch plan and photographs, together with the observations of the investigating officer as the foundation of their case. They could also avail themselves of admissions by the defence.

(per Ong Hock Thye CJ (Malaya) in *Yew You & Anor. v. Mah Poay Koh & Anor.* [1970] 1 MLJ 57 at p. 59.)

Let me now consider some of the "mute" evidence. First, the police report of the third party, now deceased, made less than an hour after the accident *vide* Police Report No. 5132/77 (AB11). The crucial part of his report was that at the material time he was travelling together with the plaintiff along Jalan Paya Terubong when at or near the Chinese cemetery he was overtaking a motorcycle, registration number unknown. At that time there was a motorcar approaching from the opposite direction. He then collided with both vehicles, as a result of which both he and the plaintiff suffered injuries. Later, they went by taxi to the hospital. Next, we have the Report No. 5143/77 of one Law Boon Huah (AB1). He was the rider of motorcycle No. PX 2155 which was at the material time travelling along the same road. According to Law, on arrival in front of the Chinese cemetery the said motorcycle PR 6062 which was travelling from the same direction collided first with a motorcar and then collided with him. He fell off his motorcycle and was later taken to hospital in a car. Thirdly, the photographs of the two motorcycles PR 6062 and PX 2155 and motorcar PM 6361 (AB7) taken in a police compound, purportedly to show the damage to the vehicles. Unfortunately, the photographs and the note in AB9 are of no assistance to me except the photograph of the car which showed what appeared to be a big dent on its near offside door. Elsewhere,

there was no visible damage seen, not even on motorcycles PR 6062. Fourthly, the sketch plan and key (AB3 & AB4) (which was drawn not according to scale) showed the presence of glass splinters on the left hand side of the road facing Air Itam (marked 'P') and a long stretch of scratch mark (M to N) measuring approximately 143 feet. It also showed the position of motorcycle PR 6062 at the place where the scratch mark ended. Not far from the said motorcycle was the position of the other motorcycle PX 2155. Perhaps, it is pertinent to state at this stage that the presence of motorcycle PX 2155 as shown on the sketch plan confirmed the content of the two police reports (AB1 and AB11). As for the said motorcar, it appeared that its bonnet was facing slightly toward the direction of Pekan Paya Terubong. The defendant's version of the accident was as follows. At the material time he was travelling from Paya Terubong toward Air Itam when he noticed two oncoming motorcycles about to overtake a taxi. He saw their lights. He was then between 300 to 400 feet away from the motorcycles. He then kept closer to his side of the road. As he approached them the plaintiff's motorcycle collided into the rear off-side of the said car. He denied that he was turning or encroaching on to the motorcycle side before the collision. On cross-examination, the defendant maintained that the motorcycle came to his side of the road and collided into his car. He swerved to his left to avoid a collision. On a suggestion by Counsel for the plaintiff that the sketch plan showed the position of his car to be facing on the motorcycle's side of the road, the defendant explained that the position as shown in the sketch plan was incorrect. He however, agreed that on impact a portion of his motorcar landed on the grass verge.

On the same evening, at about 9 p.m. the defendant lodged a police report at Balai Polis Ayer Itam *vide* Report No. 5142/77 (AB13) which confirmed his evidence in chief.

Based on the evidence which I have highlighted above, in my judgment, the collision could not have happened in the manner as pleaded by the plaintiff in the "particulars of negligence" in his statement of claim. None of his supporting evidence corroborated his claim. First, the plaintiff by his own evidence has failed to show how the accident occurred because he admitted that he was not paying attention while riding as a pillion on the said motorcycle. He did not even know on which side of the road the collision occurred. Secondly, the evidence of PW2, which I ruled as unreliable did not help the plaintiff's case at all because as stated, he did not see how the accident occurred except hearing a loud sound. Thirdly, the neutral evidence in the form of the police sketch plan, the photographs and the admitted documents i.e. the police reports, AB1 and AB11, have not supported his allegations in the "particulars of negligence" that the cause of the accident was due to the failure on the part of the defendant to stop the said motorcar before turning right and/or turning right without first allowing the said motorcycle to proceed. In fact, the two police reports, AB1 and AB11 completely contradicted these allegations. Again from the sketch plan and the photograph of the said motorcar, I can safely conclude that at the material time and immediately before the collision, the said motorcycle was travelling too fast in the circumstances; that the collision occurred on the said motorcar's right of way; and that the damage to the said motorcar implied that the said motorcycle had hit into the rear offside and could not have been a direct collision.

On the other hand, I find the defendant's version to be more probable and the "mute" evidence seemed to corroborate this version. First, I accept the defendant's evidence that he was travelling on his side of the road and the said motorcycle collided into the rear offside of his motorcar. I also believed him when he stated under cross-examination that he swerved to his left in order to avoid the collision. This is also borne out by the damage to the said motorcar from which it could be inferred that he did swerve to its left to avoid the said motorcycle. There were no damages seen on the front part of the motorcar for me to at least

draw an inference that the collision occurred head-on or that it was a result of the said motorcar turning to its right into the path of the said motorcycle as pleaded in the statement of claim. Secondly, the presence of glass splinters on the defendant's side of the road as shown in the sketch plan impressed me with the probability that the collision took place on the defendant's side of the road and it was the said motorcycle which encroached to his side thereby colliding into the said motorcar. Admittedly, the position of the said motorcar as shown in the sketch plan indicated that it faced slightly in the other direction. However, on a balance of probability it was unlikely that the said motorcar encroached into the motorcycle's side of the road and collided into the said motorcycle. At any rate, I accept the defendant's explanation in his examination in chief.

Therefore, on the balance of probability in my judgment, the collision was caused by the negligent driving of the third party, deceased, in failing to keep any or any proper lookout or to observe the presence or approach of the defendant's motorcar. Further, from the scratch mark in AB3, it would appear that he was travelling too fast in the circumstances, and based on police report No. 5143/77 he must have been trying to overtake motorcycle, PX 2155 thereby encroaching into the wrong side of the road in the face of an approaching motorcar resulting in the collision. In the result, I find the third party was wholly to blame.

The remaining question to consider is whether or not the defendant was in any way guilty of contributory negligence? On this point, Mr. Kumaraendran for the defendant submitted that the defendant could not be liable for any contribution because this was never pleaded in the plaintiff's statement of claim. Counsel relied on the decision of Vohrah J in *Anuar bin Mat Amin v. Abdullah bin Mohd. Zain* [1989] 3 MLJ 313 which held that since contributory negligence was not pleaded nor brought up as an issue during the course of the trial, the Court should not take into account any question of contributory negligence. The above decision followed the English Court of Appeal case in *Fookes v. Slaytor* [1979] 1 All ER 137. It is also an elementary rule of civil practice that every pleading must contain the necessary particulars of any claim, defence or other matter pleaded (O. 18 r. 12 Rules of the High Court). In the present case, the plaintiff had not only failed to plead contributory negligence, but did not even bring up the issue during the trial. In fact, there was no suggestion made to the defendant, under cross-examination, that he was in any way guilty of contributory negligence. However, when confronted with this issue during the submissions of Counsel, learned Counsel then applied to me for leave to amend the plaintiff's statement of claim to include a plea of contributory negligence. I had to in the circumstances of the case, reject the application. Even assuming that I was wrong in the exercise of my discretion in refusing the amendment, on the facts of the case, I cannot find the defendant in any way guilty of contributory negligence because I accepted his evidence that he swerved to his right to avoid the collision. This showed that he had taken an evasive action to avoid the collision and had therefore exercised due care and proper control of his motorcar.

Therefore, in the circumstances of the whole case, much as I sympathise with the plaintiff for his pain and suffering because of this unfortunate accident, I have no alternative but to dismiss his claim with costs.

Lastly, in view of my finding on liability, I find at this stage unnecessary to decide on quantum.

Also found at [1991] 1 CLJ 515